IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1414 OF 2003

Bajaj Tempo Limited,
Akurdi,
Pune- 411 035 .. **Appellant**

..**versus**.

The Employees State Insurance Corporation,
Sub Regional Office,
Swargate,
Pune- 411 042 .. **Respondent**

Mr. Sudhir Talsania, Advocate, i/b
M/s Sanjay Udeshi & Company, for the Appellant.
Mr. Rajan Jaykar, Advocate, i/b
M/s M.B. Jaykar & Company for Respondent.

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Coram : K.J. Rohee, J.

Reserved on : April 18, 2006.

Pronounced on : May 2, 2006.

Judgment :

This is an appeal under Section 82 of the Employees' Insurance Act, 1948 against the judgment of the Employees' State Insurance Court, Pune dated 26.09.2002

in Application (ESI) No.2 of 1991 rejecting the application under Section 77 of the Employees State Insurance Act, 1948 (hereinafter referred to as “the ESI Act” for short) and upholding the order dated 26.11.1990 by the Deputy Regional Director, Employees State Insurance Corporation (hereinafter referred to as “the ESIC” for short) Pune under Section 45-A of the ESI Act.

2. There is little dispute about facts. The appellant is a public limited company incorporated under the Companies Act, 1956 having its registered office at Akurdi, Pune and one of its factories at Akurdi. The appellant is engaged in the manufacturing of commercial vehicles. It has engaged about 2400 workmen , majority of whom are covered under the ESI scheme.

3. By order dated 26.11.1990 under Section 45-A of the ESI Act, the appellant was called upon to pay its contribution amounting to Rs.3,67,175.80 ps for the period from October 1981 to August,1988 and interest thereon amounting to Rs.1,24,168.55 ps upto 31.10.1990 total Rs.4,91,344.35 ps failing which the same would be recovered as arrears of land revenue. The said contribution was demanded for the period from October,1981 to August,1988 on the amount of wages paid to the employees engaged by the contractors for construction of new buildings and repairs

and maintenance of the existing buildings.

4. The appellant challenged the said order by moving an application under Section 77 of the ESI Act before the Employees' Insurance Court. The main grounds on which the said order was challenged are as under:-

(i) That the persons engaged by the contractors were not the employees of the appellant within the meaning of Section 2(9) of the ESI Act;

(ii) That the contribution has been charged by presuming wages as 25 % of the actual expenditure whereas a very small portion of the amount not exceeding 8% of the total costs relates to wages. The ESI authorities failed to check up with the contractors the actual amount of wages paid by them to the persons engaged by them;

(iii) That another such order relating to the earlier period has been challenged by the appellant before the High Court and that Appeal No.260/1990 is pending before the High Court. Thus the impugned order was passed with undue haste and in colourable exercise of the rights given to ESIC; and

(iv) That the demand made by ESIC is barred by limitation under the proviso to Section 77 (1) (b) of ESI Act whereunder there is a bar to the claim after five years of the period to which the claim relates. (The learned counsel for the

appellant , however, did not press this point before me.)

5. Thus according to the appellant, the demand made by ESIC is illegal, unjustified and untenable. The appellant, therefore, prayed for a declaration that the appellant is not liable to pay any contribution or interest as demanded by ESIC by its order dated 26.11.1990. Alternatively the appellant prays that in case it is held that the appellant is liable to pay contribution, then the costs of wages should be taken as 8 % of the total amount paid to the contractors and contribution thereon be calculated and be recovered from the contractors and be paid to the appellant.

6. The respondent/ESIC opposed the application by its detailed written statement running into 25 pages with full of repetitions. It justified its order dated 26.11.1990. According to the respondent the payment of contribution is the statutory liability of the appellant. As the appellant failed to discharge its liability, the appellant is liable to pay interest. It further submitted that it was the duty of the appellant to maintain proper records and to give bifurcation of the amount spent on material and the amount paid as wages. However, the appellant failed to maintain proper records and wants to shift its responsibility to the respondent. The appellant never made any effort to find out wage component involved in the matter and wants to take advantage of its own inaction. The

appellant disputed its liability for the sake of dispute only. The application is vexatious and is liable to be dismissed.

7. In support of its application, the appellant examined its Senior Executive Accountant whereas the respondent examined its Assistant Director and two Inspectors. After considering the oral and documentary evidence on record, the Employees' Insurance Court found that the appellant failed to prove that the order dated 26.11.1990 passed under Section 45-A by the ESI Authorities is illegal. The Employees' Insurance Court further held that the appellant is not entitled to any relief. Consequently the Employees' Insurance Court rejected the application of the appellant. The said judgment is under challenge.

8. I have heard Mr. Sudhir Talsania, Advocate for the appellant and Mr. Rajan Jaykar, Advocate, for the respondent.

9. The following points arise for my determination and I give findings on them as under:

(i) Whether the persons employed by the contractors are the employees of the appellant within the meaning of Section 2 (9) of the ESI Act ? ... Yes.

(ii) Whether the wage component taken by the respondent as 25 % of the total costs is unjustified ? ...	No.
(iii) What order ?	The appeal is dismissed with no order as to costs.

R E A S O N S

10. Mr. Sanjay Udeshi, the learned counsel for the appellant in the first instance urged that new buildings constructed by the appellant cannot be termed as factories or establishments unless any activity as such is started in the buildings by obtaining necessary licence/permit. It is only after commencement of the activities on obtaining necessary licence/permit that the buildings can be said to be factories or establishments attracting the provisions of ESI Act. The learned counsel for the appellant, therefore, submitted that the provisions of ESI Act are not at all attracted to the new buildings.

11. The above submission on the face of its appears to be very attractive, but the fallacy therein lies in the fact that it is not disputed that new buildings were constructed in the premises of the appellant for expansion of its activities and

not for any other purpose unconnected with its venture. In view of this, it does not fit in the mouth of the appellant to say that the new buildings cannot be termed as factories or establishments so as not to attract the provisions of ESI Act.

12. The next and most important submission made by the learned counsel for the appellant is that the new buildings were constructed by the appellant through various contractors. The work of repairs and maintenance of the buildings was also carried out through different contractors. Those contractors engaged persons for performing the work entrusted to them. The appellant supplied material for construction and also paid amounts for various jobs performed by the contractors. The appellant is not aware of the wages paid by the contractors to the persons engaged by them. In fact the construction of buildings and the work of repairs and maintenance thereof was not done under the supervision of the appellant or its agent. Hence the persons engaged by the contractors cannot be said to be the employees of the appellant within the meaning of Section 2(9) of the ESI Act and the appellant cannot be said to be the principal employer within the meaning of Section 2 (17) of the ESI Act.

13. In support of his submission, the learned counsel

for the appellant placed reliance on **C. E.S. C. Limited and others .vs. Subhash Chandra Bose and others (1992) 1 Supreme Court Cases 441** confirming the decision of the Division Bench of the Calcutta High Court in **Subhas Chandra Bose and others .vs. ESI Corporation and others** which set aside the judgment of the Single Bench while deciding L. P. A. against the same. The learned counsel for the appellant submitted that in order to attract the definition of "Employee" in section 2(9) (ii) of ESI Act, the most important element is that of supervision which is lacking in the present case and as such the persons employed by the contractors cannot be regarded as the employees of the appellant.

14. The case cited supra was relating to the work of laying of new underground electric cables and conversion of overheads and service to underground system. The work was carried out outside the factory or establishment of the principal employer. The work was carried out over public roads and underground by the contractors without any supervision of the principal employer or its agents. After completion of the work, there was simple checking of the completed work and it was held that the checking did not imply that the same was supervised by the principal employer or its agent when the work was being executed. It was observed that checking of a work after the same is

completed and supervision of the same while the same is being performed are entirely different. It was held that where the employees of the immediate employer work outside the factory or the premises of the principal employer, they would have the benefit of the Employees' State Insurance only if they work under the supervision of the principal employer or its agents. The judgment of the Division Bench of the Calcutta High Court was confirmed by the Supreme Court by majority. It was observed by the Apex Court that :

> *"When the employee is put to work under the eye and gaze of the principal employer, or his agent, where he can be watched secretly, accidentally, or occasionally, while the work is in progress, so as to scrutinise the quality thereof and to detect faults therein, as also put to timely remedial measures by directions given, finally leading to the satisfactory completion and acceptance of the work, that would in our view be supervision for the purposes of Section 2 (9) of the Act. It is the consistency of vigil, the proverbial 'a stich in time saves nine'. The standards of vigil would of course depend on the facts of each case."*

15 On this background it was held that the employees of the contractors were not the employees of the principal employer within the meaning of Section 2(9) (ii) of the ESI

Act. It was further held that the work being highly sophisticated in nature, requiring special skill and expertise, was given to the contractors on the condition that the latter will have to provide competent supervision. Supervision rested with persons holding valid certificates of competency.

16. In the present case the work of construction was not carried out elsewhere away from the factory or establishment of the appellant, but it was carried out very much within the premises of the appellant apparently under the immediate gaze or overseeing of the appellant or its agents. As such the judgment in Subhash Chandra Bose case is not helpful to the case of the appellant.

17. It may be noted that in para no.49 of the judgment, the Division Bench of the Calcutta High Court specifically made it clear that the said judgment will be operative only in respect of the works done by the employees of the appellants in the public highways and other places not being the premises or the factory of respondent no.4 (principal employer). If any work is being done by the employees of the appellants in the factory or the premises including sub stations or generating stations or any other establishment of respondent no.4 or any part thereof, the employees engaged in such work would come within the purview of the ESI Act.

18. It is important to note that the judgment of the Division Bench of the Calcutta High Court was confirmed by the Apex Court in its entirety including the clarification recorded by the Division Bench in the last para of the judgment mentioned above.

19. In **Royal Talkies, Hyderabad and others .vs. Employees State Insurance Corporation – (1978) 4 Supreme Court cases 204** while studying the anatomy of the "employee" as defined in Section 2 (9) of the ESI Act, the Supreme Court observed :-

> *"The clause contains two substantive parts. Unles the person employed qualifies under both, he is not an `employee' . Firstly he must be employed "in or in connection with" the work of an establishment. The expression "in connection with the work of an establishment" ropes in a wide variety of workmen who may not be employed in the establishment. Some nexus must exist between the establishment and the work of the employee but it may be a loose connection... It is enough if the employee does some work which is ancillary, incidental or has relevance to or link with the object of the establishment.*
>
> *Merely being employed in connection with the work of an establishment, in itself,*

does not entitle a person to be an "employee". He must not only be employed in connection with the work of the establishment but also be shown to be employed in one or other of the three categories mentioned in Section 2 (9).

Section 2 (9) (i) covers only employees who are directly employed by the principal employer...

Therefore, we move down to Section 2(9) (ii). Here again, the language used is extensive and diffusive imaginatively embracing all possible alternatives of employment by or through an independent employer. In such cases, the 'principal employer' has no direct employment relationship since the 'immediate employer' has no direct employment relationship since the 'immediate employer' of the employee concerned is some one else. Even so, such an employee, if he works (a) on the premises of the establishment, or (b) under the supervision of the principal employer, or his agent "on work which is ordinarily part of the work of the establishment or which is preliminary to the work carried on in or incidental to the purpose of the establishment", qualifies under Section 2(9) (ii). The plurality of persons engaged in various activities who are brought into the definitional net is wide and considerable; and all that is necessary is that the employee be on the

> *premises or be under the supervision of the principal employer or his agent... All that the statute requires is that the work should not be irrelevant to the purpose of the establishment. It is sufficient if it is incidental to it... Surely, such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either".*

20. In **Regional Director -ESIC .vs. P.K. Jacob, - 1981 Lab. IC 237 (Kerala High Court)** followed by this Court in **All India Reporter Ltd. Nagpur ..vs. Employees' State Insurance Corporation, Nagpur 1985 Lab. I.C. 1181 (Bombay)** it was held that :

> *"Where it is established that the employees are working in the premises of the factory or establishment, it is not necessary to consider further whether the employees are working under the supervision of principal employer or his agent."*

21. In **Regional Director, ESI Corpon. Madras .vs. South India Flour Mills (P) Ltd. 1986 Lab I.C. 1193 (SC)** , a specific issue was considered as to whether the workers employed for the construction of additional buildings for expansion of the factories are employees within the meaning of Section 2(9) of the ESI Act and it was held that:

> *"the work of construction of additional buildings required for the expansion of a factory must be held to be ancillary, incidental or having some relevance to or link with the object of the factory. It is not correct to say that such work must always have some direct connection with the manufacturing process that is carried on in the factory. The expression "work of the factory" should also be understood in the sense of any work necessary for the expansion of the factory or establishment or for augmenting or increasing the work of the factory or establishment. Such work is incidental or preliminary to or connected with the work of the factory or establishment."*

22. In **Regional Director, ESI Corporation .vs. Vijaymohini Mills – I CLR (High Court Kerala) 625** , it was held:-

> *"The construction workers in this case were employed in the work of expansion of new spinning shed. The work, no doubt, has no direct connection with the spinning process that is carried on in the factory. But the work of construction of additional buildings required for the expansion of the factory must be held to be ancillary or incidental or preliminary or connected with the work of the factory.*

> *The construction workers undoubtedly are persons employed for wages in work which is preliminary to the work carried on in or incidental to the purpose of the factory. They are employed in the premises of the factory through an intermediate employer. The contractor in this case is undoubtedly the immediate employer. The E.S.I. Court was in serious error in holding that the construction workers are not employees of respondent mill under S. 2 (9)(ii) of the Act. They are employees under the respondent mill and wages paid to them will have to be reckoned for the purpose of computing contribution payable by the respondent mill."*

23. In **Regional Director, ESI Corpon. .vs. Kerala Wheat Flour Roller Mill – II L.L.J. High Court Kerala 839**, it was held that:

> *"The construction of the office building or the maintenance or repair of existing building is a work 'incidental to the purpose' of the establishment. The office building is inseparably belonging to, connected with or inherent in establishment."*

24. Thus there is no difficulty in holding that the persons engaged by the contractors in the present case are

the employees within the meaning of Section 2 (9) (ii) of ESI Act the contractors being immediate employer within the meaning of Section 2 (13) and the appellant being principal employer within the meaning of Section 2 (17) of ESI Act. It , therefore, follows that the appellant is liable to pay contribution under the provisions of ESI Act.

25. It seems that the Employees Insurance Court has not discussed as to how the persons engaged by the contractors are the employees within the meaning of Section 2 (9) of ESI Act and in para no.18 of the judgment straightway came to the conclusion that the contention of the appellant that the persons engaged by the contractors are not its employees cannot be upheld. Considering the factual position and the interpretation given in the case law discussed above, I come to the conclusion that the persons engaged by the contractors are the employees of the appellant within the meaning of Section 2 (9) (ii) of the ESI Act.

26. It was further contended by the learned counsel for the appellant that the ESI authorities were not justified in taking wage component as 25 % of the total costs. It was contended by the learned counsel for the appellant that the Inspectors of the respondent should have called upon the contractors to submit their accounts and should have

ascertained the actual wages paid to the persons engaged by the contractors. However, the authorities failed to do so and shifted the entire burden on the appellant to show the exact amount of wages paid to the persons engaged by the contractors. It was submitted that the appellant had no man power to ascertain this and the evidence of the Architect was enough to establish that the wage component cannot exceed 8% of the total expenditure.

27. It may be noted that under Section 40 of the ESI Act, it is the primary duty of the principal employer to pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution. Under Section 41 of the ESI Act a principal employer, who has paid contribution in respect of an employee employed by or through an immediate employer, shall be entitled to recover the amount of the contribution so paid from the immediate employer, either by deduction from any amount payable to him by the principal employer under any contract or as a debt payable by the immediate employer.

28. The principal employer is also obliged to maintain certain record. However, in the present case the principal employer viz the appellant has failed to maintain such record. By saying that ESI Inspectors should have inspected the

records of the contractors, the appellant is trying to take advantage of its own negligence and inaction which is not permissible.

29. In **Employees State Insurance Corporation .vs. Hotel Kalpaka International – AIR 1993 Supreme Court 1530** (A) it was observed:

> *"Under S. 40 the primary liability is of employer to pay, not only the employer' s contribution but also the employee' s contribution. Therefore, the employer cannot be heard to contend that since he had not deducted the employee' s contribution on the wages of the employees, he could not be made liable for the same. The object of making a deeming entrustment under sub-sec. (4) of S. 40 will be altogether rendered nugatory if the employer is not made liable. After all, when he makes employee' scontribution, he is entitled to deduct from the wages."*

30. In **Sree Sivakami Mills Ltd. Madurai .vs. Employees' State Insurance Corporation, Madras- 2001-I-LLJ 1512 (Madras High Court)** 75% deduction was given in respect of the costs of machinery and other materials and 25% was taken as wages in the light of the guidelines issued by the Department. In the absence of any material produced

by the appellant to substantiate its claim, I see no difficulty in upholding the contentions of the respondent to take wage component at 25% of the total costs.

31. In the result, I find that there is no merit in the appeal and it deserves to be dismissed. Hence I pass the following order:-

The appeal is dismissed with no order as to costs.

(K. J. Rohee, J.)

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